83-634

NO.

IN THE SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1983

CALIFORNIA DEPARTMENT OF CORRECTIONS,

Petitioner,

v.

THE UNITED STATES OF AMERICA
and the
UNITED STATES MARSHALS SERVICE,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Does the Eleventh Amendment prohibit a federal court from ordering a State custodian of an inmate witness to produce and guard, at State expense, the prisoner in a federal courtroom for the trial of a civil action in which the State is not a party?

2. Does a writ of habeas corpus ad testificandum, requiring a State custodian of an inmate witness to produce and guard, at State expense, the prisoner in a federal district courtroom for the trial of a civil action in which the State is not a party, impose an unreasonable burden upon the third-party State?

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The petitioner, California Department of Corrections, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on August 18, 1983.

OPINION BELOW

The Opinion of the Court of Appeals is unreported. A copy of the opinion is attached to this petition as Appendix A.

JURISDICTION

The judgment of the Court of Appeals was entered on August 18, 1983. This petition is timely filed within 60 days of that date.

The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Eleventh Amendment to the United States Constitution states: "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State."

STATUTES INVOLVED

28 U.S.C. § 1651(a) provides: "The Supreme Court and all courts established by Acts of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

28 U.S.C. § 2241 provides in pertinent parts: "(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of a district court of the district wherein the restraint complained of is had."

* * *

"(c) The Writ of habeas corpus shall not extend to a prisoner unless --

* * *

"(5) It is necessary to bring

him into court to testify or for trial."

STATEMENT OF THE CASE

In May 1980, Weldon Wiggins, then a pre-trial detainee in the Alameda County Rehabilitation Center, filed two civil rights actions pursuant to 42 U.S.C. § 1983 in the United States District Court for the Northern District of California. The complaints sought redress for the alleged constitutionally deficient conditions in the pretrial detention facilities of that institution. Wiggins named the County of Alameda, the Alameda County Board of Supervisors, the Alameda County Sheriff, Glen Dyer, and Deputy Sheriffs R. H. Wood, K. L. Alley, Reynoga, Silva and Sparks as defendants. Petitioner was appropriately not named as a defendant.

In May 1981, Wiggins' actions, with the consent of all parties, were referred to a Magistrate pursuant to 28 U.S.C. § 636(c)(1). The Magistrate set trial for

June 7, 1982.

On April 12, 1982, the Magistrate issued a Writ of Habeas Corpus ad Testificandum directing petitioner to produce and guard Wiggins, then an inmate convicted and sentenced to state prison and in petitioner's custody, for the trial of his action in the District Court. In a memorandum order issued with the writ, the Magistrate ordered petitioner to transport Wiggins to the San Francisco Bay Area and to bear all expenses in connection with his transportation. The order further directed petitioner to choose and pay for the housing of Wiggins while he appeared at the trial of his actions, to transport Wiggins to the District Court and to guard him while physically in the courtroom.

On May 7, 1982 the Magistrate issued a second Writ of Habeas Corpus

ad Testificandum directed to the superintendent of the penal institution at which Wiggins was then housed. A memorandum issued with the writ made it clear that the burden and obligations imposed on petitioner by the original writ and memorandum order were also imposed by the second writ.

On June 4, 1982, petitioner filed a Return to Writ of Habeas Corpus ad Testificandum and Request for Modification of Order. In its return, petitioner requested the Magistrate to modify his order to make the United States Marshals Service responsible for the transportation of Wiggins from the nearest state prison to the federal courtroom and for courtroom security. In the alternative, petitioner requested modification of the order to provide for reimbursement for its costs of transportation and security.

The Magistrate took no action on the request made in the return filed by petitioner prior to the trial of Wiggins' actions. Compelled by the Writ of Habeas Corpus ad Testificandum and the accompanying memorandum order, petitioner transported Wiggins to the federal courtroom and guarded him while there for the duration of the trial of his actions.

On September 8, 1982, sometime after the conclusion of trial, the Magistrate issued an order denying petitioner's request for modification of the memorandum order and for reimbursement for the expenses of transporting and housing Wiggins and for courtroom security.

Petitioner filed a notice of appeal from the order denying its request for modification of the memorandum order and for reimbursement of costs of transportation and security on September 16,

1982. Petitioner designated the United States of America and the United States Marshals Service as appellees. Jurisdiction in the Court of Appeals was predicated on 28 U.S.C. § 1291 and the collateral order doctrine, since the order appealed from by petitioner was not a final judgment on the merits of Wiggins' civil rights actions.

In a memorandum opinion filed on August 18, 1983, the Court of Appeals for the Ninth Ciruit concluded that it had jurisdiction to hear petitioner's appeal and then affirmed the Magistrate's order of September 8, 1982. The court concluded that absent any federal statute authorizing reimbursement for petitioner's expenses in transporting and guarding Wiggins, petitioner was not entitled to such reimbursement and that the Magistrate did not abuse his discretion in issuing the memorandum order

requiring petitioner to assume all costs of transportation and courtroom security.

REASONS FOR GRANTING THE WPIT

When the Ninth Ciruit Court of Appeals affirmed the order of the Magistrate denying petitioner's request to modify the writ of habeas corpus ad testificandum or for reimbursement for expenses incurred in compliance with the writ, it affirmed an order which imposed a liability that had to be paid with public funds from the State treasury. This order was issued in an action in which the State was not even a party. The Magistrate's order accompanying the writ required affirmative action of petitioner, a State agency; it compelled State action at State expense. Compliance with that order directly affected the finances and property rights of the State. The order was

prohibited by the Eleventh Amendment. Plenary review by this Court is necessary to determine and define the constitutional limitations upon the authority of a federal court to compel a State custodian of an inmate witness to produce and guard at State expense and without reimbursement a State prisoner-witness in a federal courtroom for the trial of an action in which the State is not a party.

In its decision the Ninth Circuit specifically rejected petitioner's position that the principles developed by this court in United States v. New York Telephone Co. 434 U.S. 159 (1977), which held that a federal court is prohibited from issuing writs or orders which impose unreasonable burdens on third parties, should be equally applicable to federal courts which seek to compel action by non-parties pursuant to writs of habeas

corpus ad testificandum. The Ninth Circuit agreed with similar reasoning in a decision of the Third Circuit in Story v. Robinson, 689 F.2d 1176 (3d Cir. 1982). The Seventh Circuit disagrees with the Ninth and Third Circuits.

In Ford v. Carballo, 577 F.2d 404, (7th Cir. 1978) the Seventh Circuit held that state prison authorities, who had been directed by a federal district court to produce and supervise a state prisoner for a trial in federal court, were entitled to reimbursement of the costs incurred in carrying out the district court's order. Id. at p. 408. The court concluded that compelling a State to produce a prisoner (at State expense) in federal court pursuant to a writ imposed an unreasonable burden upon the state. Ibid. The Seventh Circuit's decision in Ford followed from that

Court's analysis of this Court's decision in United States v. New York Telephone Co., supra, 434 U.S. 159. The Ninth Circuit and the Third Circuit have refused to apply the rule of New York Telephone Co. to cases in which states have been subjected to unreasonable burdens as a result of compliance with a federal court's writ of habeas corpus ad testificandum. The need for conformity among the circuits regarding a precise definition of the limits of the power of the federal courts to compel State action at State expense pursuant to writs of habeas corpus ad testificandum is clear. For these reasons a grant of certiorari by this Court is compelled.

ARGUMENT

1. Since it's decision in Chisholm v. Georgia, 2 Dall. 419 (1793) was overridden by the passage of the Eleventh

Amendment in 1798, this Court has repeatedly and consistently recognized the immunity of an unconsenting State from suits brought in federal courts. Cory v. White, ___ U.S. ___, 102 S.Ct. 2325, 2329 (1982); Scheuer v. Rhodes, 416 U.S. 232, 237 (1974); Edelman v. Jordan, 415 U.S. 651, 662, 663 (1974); Hans v. Louisiana, 134 U.S. 1 (1890). Equally well established is the rule that an action may be barred by the Eleventh Amendment even if the State is not named as a party. Edelman v. Jordan, supra, 415 U.S. at 663.

Applicability of a State's Eleventh Amendment immunity is to be determined from an examination of the essential nature and effect of a proceeding in the federal court. Scheuer v. Rhodes, supra, 416 U.S. at 239; Ford Motor Co. v. Department of Treasury, 323 U.S. 459,

464 (1945); Ex Parte New York 256 U.S. 490, 500 (1921). Consequently, the Eleventh Amendment prohibits any action which seeks to impose a liability which must be paid from public funds in the state treasury. Florida Dept. of State v. Treasurer Salvors, Inc., ___ U.S. ___; 102 S.Ct. 3304, 3317 (1982); Kennecott Copper Corp. v. State Tax Commission, 327 U.S. 573, 577 (1946).

Included within the protective bar of the Eleventh Amendment are actions in which a judgment would interfere with the public administration or compel a State to act or prevent it from acting. Dugan v. Rank, 372 U.S. 609, 620 (1963). Thus, the Eleventh Amendment was applicable in this case. The amendment prohibited the Magistrate from compelling petitioner, at State expense, to produce and guard Wiggins in the federal court for the trial of his actions.

The memorandum order accompanying the Magistrate's writ of habeas corpus ad testificandum and its order denying petitioner's request for reimbursement of expenses incurred in complying with the writ forced the State to subsidize Wiggins' private civil rights actions against third party defendants. Though the writ and the accompanying order were directed to the superintendent of the custodial facility at which Wiggins was then housed, the costs of transportation, housing and courtroom security were necessarily borne by the California Department of Corrections, a State agency. In effect, the order compelled the State to act and imposed a liability on the State treasury. There can be no question that the Magistrate's action against the State was barred by the Eleventh Amendment. This Court must clearly rule that a federal court is

constitutionally prohibited from compelling a State custodian of an inmate witness to produce and guard, at State expense, the witness in a federal courtroom for the trial of an action in which neither the State, nor any of its officials, is a party.

2. In United States v. New York Telephone Co., 434 U.S. 159 (1977), this Court held ". . . that the power of federal courts to impose duties upon third parties [pursuant to 28 U.S.C. § 1651, the All Writs Act] is not without limits; unreasonable burdens may not be imposed." A similar rule should prohibit federal courts from issuing writs of habeas corpus ad testificandum which impose unreasonable burdens upon third party custodians of prisoner-witnesses. Ford v. Carballo, 577 F.2d 404, 408 (7th Cir. 1978).

In its decision the Ninth Circuit rejected petitioner's position that this Court's decision in New York Telephone controlled review of the Magistrate's writ and memorandum order. It did so on an overly strict reading of that decision, noting that the order in New York Telephone directing a third party telephone company to provide federal law enforcement officials the facilities and technical assistance necessary to employ pen registers was specifically issued pursuant to 28 U.S.C. § 1651, the All Writs Act. The Ninth Circuit found that the existence of an independent authority for issuance of writs of habeas corpus ad testificandum, 28 U.S.C. § 2241(c), rendered the ruling in New York Telephone inapposite to this case. The rigid distinction established by the Ninth Circuit is one which lacks persuasiveness, and which constitutes

a mere ritualistic election of form and format over effect and substance.

In New York Telephone, this Court found that a federal district court's order to a third party telephone company was clearly authorized by the All Writs Act, and that the telephone company was not "a third party so far removed from the underlying controversy that its assistance could not be compelled." 434 U.S. at 172, 174. More importantly, this Court found that the order in New York Telephone was not burdensome, because it provided that the telephone company was to be reimbursed at prevailing rates and because compliance with it required only minimal effort. 434 U.S. at 175.

In this case the Magistrate's writ and order were authorized by 28 U.S.C. § 2241(c). That fact alone, however, does not render either the ruling in or logic

of New York Telephone inapplicable. The order in this case was clearly burdensome; it compelled petitioner to incur substantial expense. Compliance with it also required considerable effort: Wiggins had to be transported from a distant state prison to one nearer the federal courtroom, transported daily to and from the courtroom, and guarded while there. Moreover, petitioner had no interest in Wiggins' actions or in providing assistance to his prosecution of them. Under these circumstances, the analogous rule of New York Telephone compels the conclusion that petitioner was entitled to reimbursement for its expenses incurred in complying with the writ and its accompanying order.

In New York Telephone, this Court indicated that private third parties were entitled to protection from federal

court orders which would impose unreasonable burdens upon them. A State, an action against which is prohibited by the Eleventh Amendment, should, at a minimum, be entitled to the same protection when a federal court seeks to compel it to act at State expense. This is especially true in light of the fact that compliance with a federal court's writ of habeas corpus ad testificandum can impose great financial and other burdens on the State against which the writ is issued.

In view of the Ninth Circuit's decision in this case, it is not inconceivable that a federal district court in a sister State could issue a writ of habeas corpus ad testificandum requiring petitioner to produce, at its own expense, a

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prisoner for trial in that state.[1/] This possibility is not a remote one, because California, like many other States, has adopted the Interstate Corrections Compact (Cal. Penal Code §§ 11189 et seq.), which permits inmates sentenced in one State to be confined in another. If a federal court is free to compel a State custodian to produce and guard, at State expense, a prisoner-witness in a federal courtroom under these circumstances, a great strain would be placed on the limited financial and manpower resources of the State custodian. Clearly, such action by the

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1. Though this Court has not decided whether writs of habeas corpus ad testificandum may issue outside of a district court's territorial limits, Carbo v. United States, 364 U.S. 611, 618, fn.13 (1961), other courts have decided that there are no territorial limits on such writs. Itel Capital Corp. v. Dennis Mining Supply and Equipment, Inc., 651 F.2d 405, 406-407 (5th Cir. 1981); Stone v. Morris, 546 F.2d 730,737 (7th Cir. 1976.)

federal court would impose an unreasonable and intolerable burden on the State custodian of the prisoner-witness. Yet, neither the Ninth Circuit nor the Third Circuit would find such action to be impermissible.

The Ninth Circuit below and the Third Circuit in Story v. Robinson, 689 F.2d 1176 (3rd Cir. 1982), have both held that, absent a federal statute requiring the United States to transport and guard a State prisoner called as a witness pursuant to a federal writ or authorizing reimbursement to a State for its cost of compliance with such a writ, the State custodian of an inmate witness is not entitled to compensation for the expense of compliance. Story v. Robinson, supra, 689 F.2d at 1178-79.

Petitioner notes the absence in New York Telephone of any federal statute

authorizing reimbursement (which was nonetheless provided) to the telephone company for its expenses in complying with the writ requiring it to assist federal law enforcement agencies. Had that trial court's order required more than minimal effort, as the order in this case did, or had it not provided for reimbursement, which was requested but denied herein, petitioner submits that this Court would have found the New York Telephone trial court's order to be burdensome. The order in this case, made without any provision or even concern for reimbursement, was clearly the unduly burdensome sort of order with which this Court was concerned in the New York Telephone case. As the Seventh Circuit held in similar circumstances in Ford v. Carballo, supra, the State should be entitled to reimbursement for its costs of compliance with

the writ and accompanying order. Nothing less is sensible or just.

It is common knowledge that the number of federal civil rights actions filed by state prisoners has risen and continues to rise dramatically. The potentially extreme cost to the States of complying with such writs of habeas corpus ad testificandum for inmates to act as witnesses in prosecuting suits which do not even involve the State as a party is a matter of grave concern. The Ninth and Third Circuits have held that the States are not entitled to reimbursement for <u>any</u> expenses incurred in complying with such writs. The Seventh Circuit disagrees. It is time for this Court to define the limits on the power of federal courts to compel State custodians of inmate witnesses to produce and guard, at State expense, such prisoner-witnesses in federal court. It offends traditionally

held notions of justice to permit federal courts to order State custodians to pay to transport, house, feed and guard the inmate-witnesses.

CONCLUSION

For the foregoing reasons, we respectfully submit that the Petition for Writ of Certiorari should be granted.

DATED: October 14, 1983

JOHN K. VAN DE KAMP,
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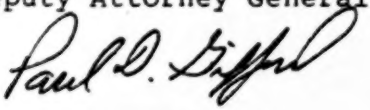
State of California

RONALD E. NIVER
Deputy Attorney General



PAUL D. GIFFORD
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Attorneys for Respondents

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WELDON WIGGINS, Plaintiff, v. COUNTY OF ALAMEDA, LYNN DYER, Sheriff; and BOARD OF SUPERVISORS of the County of Alameda, et.al., Defendants.	Nos. 82-4531 82-4532 D.C. Nos. C-80-2143 WWS C-80-3234
WELDON WIGGINS, Petitioner, v. DEPARTMENT OF CORRECTIONS of the STATE OF CALIFORNIA, Respondent-Appellant, and UNITED STATES OF AMERICA and UNITED STATES MARSHALS' SERVICE, Real Parties in Interest-Appellees.	MEMORANDUM

Appeal from the United States District Court for the Northern District of California
Hon. Frederick J. Woeflen, United States Magistrate, Presiding

Argued and Submitted: May 12, 1983
BEFORE: PECK,* FLETCHER, and PREGERSON, Circuit Judges

*Hon. John W. Peck, Senior United States Circuit Judge, sitting by designation

This is an appeal by the Department of corrections of the State of California (State) from an order of United States Magistrate requiring the department to transport, guard, and pay all expenses associated with securing the presence of Weldon Wiggins, a state prison inmate, at the trial of his federal civil rights suit against the County of Alameda, see Weldon Wiggins v. County of Alameda, Nos. 82-4399 & 82-4400 (9th Cir. appeal filed Sept.16, 1982). On appeal, the State argues that the district court abused its discretion by requiring the State to bear the costs of securing Wiggins' presence at his trial in federal court.

I

JURISDICTION

Both parties assert that this court has jurisdiction to hear the State's appeal. Generally, an appeal to this court from a judgment entered in a case

tried by consent before a magistrate is authorized in those situations in which an appeal would have been authorized if the judgment had been entered by a district court. See 28 U.S.C. § 636(c)(3) (Supp. IV 1980). Under 28 U.S.C. § 1291 (1976), the court of appeals has jurisdiction over all "final decisions of the district courts." The parties suggest that the magistrate's order appealed from in this case would be reviewable under section 1291 and the collateral order doctrine of Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949), even though it is not a final judgment on the merits of Wiggins' civil rights suit. They seek to characterize the appeal as an interlocutory appeal on an issue collateral to the underlying suit against the County of Alameda.

In Story v. Robinson, 690 F.2d 1176 (3d Cir. 1982), the Third Circuit considered a similar interlocutory appeal by the Commonwealth of Pennsylvania. In that case, the district court had ordered the Commonwealth to bear a part of the costs of housing and transporting to federal court a state prisoner who was the plaintiff in a federal civil suit. The Third Circuit determined that it had jurisdiction of the Commonwealth's appeal, reasoning as follows:

> The orders appealed from were entered in a pending civil action which has not yet resulted in a final judgment. The Commonwealth contends, however, that the order from which it appeals is a final order within 28 U.S.C. § 1291. Since it fully resolves a dispute between the Commonwealth and the United States Marshal Service, . . . it is a final order collateral to the main action. Cohen v. Beneficial Loan Corp., 337 U.S. 541 (1949). . . . Thus [the appeal is] properly before us.

Id. at 1177-78; see also Coopers & Lybrand v. Livesay, 437 U.S. 463, 468

(1978); Ballard v. Spradley, 557 F.2d 476, 479 (5th Cir. 1977). The magistrate's order of Sept. 8, 1982, in this case, resolved finally the State's efforts to avoid the costs associated with securing Wiggins' presence at the trial of his civil rights action. Such an allocation of costs to the State was completely collateral to the issues raised in the underlying civil rights suit. Under these circumstances, we agree with the decision of the Third Circuit in Story that the order is a collateral order under Cohen and hold that we have jurisdiction to hear the State's appeal under section 636(c)(3).

II

ALLOCATION OF COSTS UNDER A WRIT OF HABEAS CORPUS AD TESTIFICANDUM

The State argues that the magistrate abused his discretion when he ordered the State to bear all of the expenses

associated with securing the presence of Wiggins, the state prisoner-plaintiff, at the trial of Wiggins' federal civil rights suit. The State argues that, even if the magistrate determined correctly that Wiggins' testimony was necessary, the allocation to the State of all the costs of providing this testimony, rather than dividing the costs between the State and the United States, was an abuse of discretion.[1/]

The Third Circuit's decision in Story v. Robinson, provides an accurate guide for analysis of this question.[2/] In Story, the State appealed from a district court order requiring it to produce, at its own expense, a state prisoner called as a witness in a federal civil rights trial. The district court ordered the State to produce the witness at the state detention center closest to the federal courthouse. The United States

was to be responsible for transporting the prisoner from the state facility to the federal court and back. 689 F.2d at 1177. The State argued that it could not be required to pay the costs of transporting the state prisoner to the closest state facility. The Third Circuit rejected the State's argument. It reasoned that federal statutes authorized the district court writ and order and that no federal statute required the United States to bear the costs of compliance with the writ or authorized reimbursement to the State for the costs it had incurred. The court considered and rejected arguments by the State that various federal statutes pertaining to the duties of federal marshals, including 28 U.S.C. §§ 567(2), 569(a), 569(b), and 571, required the United States either to transport and guard the prisoner or to

reimburse the State for the costs of securing the prisoner's attendance in federal court. 689 F.2d at 1179-80.

We agree with the reasoning in Story. Where there is no statutory authority requiring the United States to transport and guard a prisoner called as a witness by a validly issued federal writ or authorizing reimbursement to the state for the costs of compliance with such a writ, then there is no basis upon which the state can seek compensation for its expenses.

Ballard v. Spradley does not compel a contrary conclusion. In Ballard, the Fifth Circuit did approve an allocation of costs between state and federal security agencies, but it stated:

> We expressly reject the Marshals Service's contention that the interests of Florida so outweigh those of the federal government that Florida should be required to bear complete responsibility for the prisoners' transportation. The

> rights invoked are federal in nature, and prisoners' habeas and writ rights actions play an equal, vital role of "importance in our constitutional scheme . . . ."

Id. at 481 (quoting Wolff v. McDonnell, 418 U.S. 539, 577 (1974)). We do not believe this language compels the conclusion that the magistrate in the instant case abused his discretion in allocating to the State of California all of the costs associated with bringing Wiggins to testify at the trial of his civil suit. We can find no authority for the proposition, implicit in the Fifth Circuit's language, that the question of who should pay for a state prisoner's presence is to be determined by reference to the varying interests of the parties that may be held responsible for these costs. Instead, the proper inquiry is whether Congress, which authorized district courts to issue writs of habeas corpus

ad testificandum, ever authorized reimbursement for costs of compliance with a writ. We have not found any such Congressional authorization, nor has appellant cited to us a statute that would authorize reimbursement. Enactment of a statute, compliance with which will require a state or entity to incur costs, does not in itself create a right to reimbursement. We conclude that a district court judge has the discretion to allocate the costs of compliance with a writ ad testificandum in any number of combinations. These combinations include the clearly preferable sharing of costs approved in Ballard and Story as well as imposing full costs on the United States, see 28 U.S.C. §§ 567(2), 569(b), or, as in the instant case, imposing the full costs on the state.

We decry the inability of state and federal officials to resolve such matters

fairly and equitably, but we have been cited no authority to support a holding that the magistrate abused his discretion in issuing the order imposing on the State all costs of bringing plaintiff Wiggins into court to testify at the trial of his civil rights suit.

AFFIRMED.

FOOTNOTE

1/ The district court's power to issue a writ of habeas corpus ad testificandum to secure the testimony of a state prisoner witness is beyond dispute. See Ballard v. Spradley, 557 F.2d 476, 480 (5th Cir. 1977). In Ballard v. Spradley, the Fifth Circuit discussed the factors which should guide a district court in determining whether to issue the writ to bring a state prisoner witness into federal court.

> When determining whether it should issue a writ of habeas corpus ad testificandum in such instances, the district court must exercise its discretion based upon consideration of such factors as whether the prisoner's presence will substantially further the resolution of the case, the security risks presented by the prisoner's presence, the expense of the prisoner's transportation and safekeeping, and whether the suit can be stayed until the prisoner is released without prejudice to the cause asserted.

577 F.2d at 480. The magistrate here explicitly relied on these factors in

determining whether to issue the ad testificandum writ to secure Wiggins' presence at the trial of his civil rights suits. Since the State does not argue the magistrate erred in his determination that the benefits of Wiggins' presence and testimony at the trial of his civil rights suits justified issuance of an ad testificandum writ, the narrow question presented on this appeal is whether the magistrate abused his discretion in allocating to the State, a non-party, the costs of securing Wiggins' attendance at trial, once the magistrate had determined that a writ of habeas corpus ad testificandum should be issued for Wiggins.

2/ We do not find Ford v. Carballo, 577 F.2d 404 (7th Cir. 1978), an appropriate guide. In Ford, the Seventh Circuit concluded that the district court's authority to issue the

challenged writ was to be found only in 28 U.S.C. § 1651(a)(All Writs Act). From this premise, the court proceeded to decide the case before it by analogy to cases decided under § 1651(a). These cases hold that the power of the federal courts to issue writs under § 1651(a) extends only to writs which do not impose unreasonable burdens on non-parties. See, e.g., United States v. New York Telephone Co., 434 U.S. 159, 172. We believe, however, that the Seventh Circuit was mistaken in looking solely to the cases decided under section 1651(a) for guidance in evaluating a writ of habeas corpus ad testificandum. The ad testificandum writ is specifically and independently authorized by 28 U.S.C. § 2241(c)(5). Thus, the principles developed under § 1651(a), including the rule of New York Telephone, do not control review of the instant writ.